

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: PETER HOUTENBOS

FAA Order No. 2002-24

Docket No. CP00WP0033
DMS No. FAA-2000-7868¹

Served: November 22, 2002

DECISION AND ORDER²

Respondent Peter Houtenbos appeals from the oral initial decision rendered by Administrative Law Judge Burton S. Kolko, finding that Houtenbos violated 14 C.F.R. § 91.11 by assaulting a flight attendant and interfering with the duties of the first officer during a flight. For the reasons set forth in this decision, Houtenbos' appeal is denied, and the decision of the ALJ is affirmed.

I.

Complainant alleged that Houtenbos violated 14 C.F.R. § 91.11 while a passenger on TWA Flight 849, from New York, New York, to Los Angeles International Airport, California. Section 91.11 of the Federal Aviation Regulations provides:

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions, as well as indexes of the decisions, the Rules of Practice in civil penalty actions, and other information, are available on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and Westlaw. Additional information is available on the website.

Prohibition on interference with crewmembers.

No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated.

14 C.F.R. § 91.11.

At the hearing, the parties presented conflicting versions of the incident. Zohar Billing, the flight service manager on TWA Flight 849, testified that Houtenbos pushed her against the counter in the galley and later threatened and intimidated her. Two passengers, Richard Friedel and John Stuart, corroborated her testimony in this regard. Houtenbos, in contrast, testified that he did not touch Billing during the flight and that he did not recall threatening to harm the aircraft. A summary of the pertinent testimony presented by each of these witnesses is set forth below.³

A. Complainant's Case – Testimony of Zohar Billing

As the flight service manager, Billing was responsible for the cabin. If there was a problem that the flight attendants could not handle, it was her responsibility to deal with it. (Tr. 11-12.)

Billing testified that near the end of Flight 849, the flight attendants in the first class cabin asked her to speak with Houtenbos. They told her that they had asked him several times to turn off his cell phone, and that after each request, Houtenbos turned it off but then turned it on again later. (Tr. 14.)

According to Billing's testimony, she explained to Houtenbos that he was not allowed to use his cell phone during the flight, and she asked him to turn it off. (Tr. 15.)

³ Complainant also presented the testimony of FAA Special Agent Shandra McDonald. The ALJ did not rely on her testimony because McDonald, who had not been on board Flight 847, was not a percipient witness to any of the pertinent events.

She noticed that the lights of his phone, which he was holding, were on. (Tr. 25, 27.)

She testified that he complied with her request and put it in his pocket. (Tr. 15, 25.)

About 5 to 10 minutes later, a flight attendant informed her that Houtenbos' phone was on again. (Tr. 15.) She testified that she went back to speak with him again, but this time asked him to give her his phone. She told him that she would return it to him after the flight had landed. (Tr. 15.) Billing testified that Houtenbos handed her the phone, and she put it in her smock pocket. (Tr. 16, 29.)

Billing testified that she went to the galley (Tr. 16, 33), and a minute or two later, Houtenbos came to the galley and grabbed her smock pocket. She asked him to remove his hands. She testified that he then grabbed her upper arms and slammed her into the counter. (Tr. 16, 33.) A flight attendant notified the first officer, who came back to the galley and spoke with Houtenbos for about 5 to 10 minutes. (Tr. 16, 36-37.) When Houtenbos sat down in his seat again, the first officer returned the cell phone to him and went back to the cockpit. (Tr. 17.)

Billing testified that Houtenbos started screaming. (Tr. 17, 38.) She said that he jumped up, went over to her, pointed a finger in her face and said, "You don't know what kind of trouble I can create." He next went into the lavatory. (Tr. 17, 39.) She stated that she stayed near the lavatory because she was concerned that Houtenbos would start a fire. (Tr. 17, 42.)⁴ When he came out of the lavatory, she explained, he hovered near her, making her feel uncomfortable, and as a result, she informed the pilots that she was going to stay in the back of the aircraft. (Tr. 17, 44-46.)

⁴ There is no evidence that he intended to, or actually started a fire in the lavatory.

Billing testified that the pilots called the police and asked them to meet the flight. She explained that she had asked them to contact the police because Houtenbos had assaulted her. (Tr. 77, 79.)

B. Complainant's Case – Testimony of Richard Friedel

Friedel was a passenger in the first-class section, sitting across the aisle from Houtenbos. (Tr. 138.) Friedel recalled that Houtenbos operated a cell phone on the plane and that several flight attendants asked him to stop. (Tr. 139.) According to Friedel, the flight attendants insisted several times that the rules required that the cell phone be turned off, and that each time, Houtenbos turned the phone off, put it in his pocket, and then took it out again 5 to 10 minutes later. (Tr. 143-144.) He heard Houtenbos explain at least once that he was only programming the phone. (Tr. 141).⁵ Later he noticed Billing talk sternly to Houtenbos and then ask him for his phone. Friedel said that to his surprise, Houtenbos relinquished the phone,⁶ and then Billing went to the front of the aircraft.

Friedel testified that about 30 seconds to a minute later,⁷ Houtenbos “darted forward, just leaped out of his seat, darted to the front of the plane.” (Tr. 139.) Friedel, as well as a couple other passengers, followed Houtenbos. (Tr. 139.) Friedel said that he followed Houtenbos because he thought that Houtenbos’ behavior was not normal and that something was wrong. (Tr. 148.) He observed Billing and Houtenbos engage in a “rather aggressive conversation.” (Tr. 139.) He said that Billing was standing with her

⁵ Friedel saw Houtenbos holding the phone and pressing the keys. The keys and the display were lit.

⁶ On cross-examination, Friedel stated that he saw Houtenbos give the phone to Billing. He said, “she did not take it from you [Houtenbos].” (Tr. 156.)

⁷ See also Tr. 156.

back against the counter, and Houtenbos “was absolutely in her face.” (Tr. 150.) Friedel testified:

“There was [a] heated discussion, and I saw him reach up and *just push her* ... on the ... upper arms ... it was momentary. It wasn’t like he tried to pin her to the floor or anything but *he clearly shoved her* and then released her.”

(Tr. 150) (emphasis added.)

Friedel explained that the first officer appeared next, and “immediately took charge.” (Tr. 150.) Friedel testified that he had been standing nearby when the first officer came out, and he heard the first officer explain about the regulations and that Houtenbos must listen to the flight attendants. (Tr. 151.) He observed the first officer walk Houtenbos back to his seat. (Tr. 152, 153.) Afterwards, Friedel testified, Houtenbos started to yell, squeal, and pace around the cabin. (Tr. 152.) When Houtenbos went to the lavatory, Friedel and some of the other passengers followed him and stood outside. (Tr. 154.)

C. Complainant’s Case – Testimony of John Stuart

Stuart was a passenger on this flight seated in the first-class section in row 2, next to the window. Stuart testified that he observed Houtenbos take out his cell phone and punch the keys. He said that the flight attendants came by regularly to tell Houtenbos that he could not use the cell phone, and after each reminder, Houtenbos put it away but then took it out again. (Tr. 160-161.) He said that the flight attendants must have spoken to Houtenbos five or six times about using the cell phone. (Tr. 162-163.)

Stuart testified that “fairly well into the flight,” Billing asked Houtenbos to turn off his cell phone. Houtenbos complied, but then took it out again. Stuart stated that

Billing asked him to give her the phone. He gave it to her, Stuart testified, and she put it in her smock. (Tr. 166.)

According to Stuart, Houtenbos bolted out of his seat about 1 minute later and went to the galley. Stuart got up and followed Houtenbos into the galley. (Tr. 167.) Stuart explained that he saw Billing and Houtenbos having a heated argument. Billing insisted upon holding Houtenbos' phone for the remainder of the flight. Stuart stated that Houtenbos was "right in her face," and then suddenly he slammed her shoulders against the wall. (Tr. 167.) Stuart testified, "It was not just merely a push It was clearly a physical attack." (Tr. 168.)⁸ He observed Houtenbos immediately back off. (Tr. 168.)

The first officer appeared soon afterwards and indicated that he would handle the situation. Stuart testified that the first officer asked Stuart to "stay here." (Tr. 168.)

According to Stuart, the first officer dealt with Houtenbos very diplomatically and promised to give Houtenbos his cell phone if he would sit in his seat for the rest of the flight. The first officer escorted Houtenbos to his seat. (Tr. 168.)

After returning to his seat, Houtenbos started to screech, rock his head back and forth, and hit the side of his head. (Tr. 169-170.) Later Houtenbos went to the lavatory, and Stuart got up. Stuart testified that he thought that Billing must have been concerned because she asked him to stay with her. (Tr. 170.) Stuart observed Houtenbos get near Billing when he went to the bathroom. (Tr. 171.)

D. Respondent's Case – Testimony of Peter Houtenbos

Houtenbos testified that he thought that people had been watching him throughout the flight and that they had the "misperception" that he was a "weirdo." (Tr. 206-207,

⁸ Stuart testified on cross-examination that he saw Houtenbos push Billing violently. (Tr. 184.)

210-211.) He stated, "I tripped ... something off in all of those people, and it just ballooned into this situation where we end up today." (Tr. 207.)

Houtenbos acknowledged that he had heard the flight attendant make the announcement to turn off cell phones. (Tr. 211, 239.) His wife wanted him to program her new cell phone, and he thought that he could do it during the flight. He explained that he did not make any calls during the flight, and he brought a copy of his telephone bill to the hearing to support this claim. (Tr. 212.) He stated that a flight attendant told him before dinner that he could not make any calls with his cell phone and he told her that he was only programming the phone. (Tr. 214.) He stated that he had a friendly conversation with some flight attendants about the dangers of making calls with the cell phone during a flight, but that he had told them that programming the phone was not a hazard. (Tr. 215.)

Houtenbos testified that Billing spoke with him later, and he explained to her that he was only programming the phone. "I might have been at that point a little snotty or arrogant or whatever, but that's ... not against the law." (Tr. 217.) He testified that Billing came back later and "ripped" the telephone out of his hands. Houtenbos said that Billing's action was "shocking" and he felt "violated." (Tr. 218, 242.) He insisted that he did not sit in his seat dumbfounded, but instead immediately sprang up and followed Billing. (Tr. 218, 246.) According to Houtenbos, he asked her to give him back his phone, while she was standing with her back against the galley wall and he was standing in front of her. He denied ever touching her. (Tr. 204, 218, 226.)

He testified that soon afterwards, the captain or the first officer came out of the cockpit and spoke with him. The first officer gave him back his phone and told him to

stay in his seat. (Tr. 218-219.) Houtenbos testified that he sat in his seat for a while and then started to make noises. He went to the bathroom. He testified that he did not recall sticking his finger in anyone's face or saying that he would harm the airplane. (Tr. 220-221.)

II.

At the conclusion of the hearing, the ALJ issued an oral initial decision. He began his decision by explaining that this case did not involve any alleged violations of Federal Aviation Regulations pertaining to cell phone use⁹ on a flight or failure to comply with the instructions of a flight attendant. (Tr. 261.)

The ALJ explained that he accepted Billing's testimony that Houtenbos pushed and intimidated her as well as Houtenbos' testimony that he never touched her. (Tr. 263.) He explained, "I find that each testified in a manner that he or she very earnestly believes what they testified to." (Tr. 263.) To resolve this conflict, he relied on the "equally credible testimony" given by Friedel and Stuart, corroborating Billing's claim that Houtenbos slammed her into the galley wall. (Tr. 263-264.) He described their testimony as "thoroughly competent" and found that neither Friedel nor Stuart, unlike both Billing and Houtenbos, had any self-interest in the outcome of this proceeding. (Tr. 264-265.)

The ALJ held that Houtenbos shoved Billing, thereby committing a battery, which is a violation of Section 91.11. The ALJ found that Houtenbos subsequently violated Section 91.11 again by threatening and intimidating Billing. Finally, he held, Houtenbos

⁹ Although he did not need to do so, the ALJ held that Houtenbos did not make any calls on his cell phone during the flight. (Tr. 265.)

violated Section 91.11 a third time when Houtenbos' behavior required the first officer to leave the cockpit and, as a result, neglect his piloting duties. The ALJ held:

As soon as a passenger's conduct is such as to require – and I use the word “require” – require the presence of a person whose duties are to fly the airplane and force him to leave the flight deck to deal with that passenger's conduct, that passenger has interfered with that particular crew member's duties even in level flight, and certainly where this plane was.

(Tr. 269.)

The ALJ concluded his decision by assessing a \$3,300 civil penalty against Houtenbos for these three violations of Section 91.11.

III.

1. Houtenbos complains on appeal that he revealed his “incompetence” and the details of his case to the agency attorneys during the informal conference and the subsequent settlement discussion. Houtenbos argues that the agency attorney used that information “to craft his case accordingly.” (Appeal Brief at 2.) He argues, “as a result of my voluntary hearing with counsel Lewerenz, all 3 witnesses were primed to content (sic) that I *gave* the phone to witness Billing, as opposed to it being ripped out of my hand from behind. And that it took *a few minutes* before I got up and assaulted her instead of springing up immediately.” (Appeal Brief at 8) (emphasis in the original.)

Agency policy prohibits the use of the informal conference to gather evidence to prove the allegations in an enforcement action. *See* FAA Order 2150.3A, FAA Compliance and Enforcement Program, p. 157 (1988).” In the Matter of Northwest Aircraft Rental, Inc., FAA Order No. 1994-4 (March 10, 1994).¹⁰ There is no evidence in

¹⁰ However, statements made during an informal or settlement conference may be used to impeach credibility. In the Matter of Northwest Aircraft Rental, Inc., FAA Order No. 1994-4 at 5-6.

the record that the agency attorneys used the informal conference or the later settlement discussion to obtain evidence to prove the allegations. Houtenbos' mere unsupported assertions do not prove that Friedel's and Stuart's testimony that Houtenbos handed Billing the cell phone and then sat for a while before following her into the galley was shaped by information that he may have provided at the informal conference.

In general, moreover, what happens at an informal conference is not at issue before an ALJ at a hearing. In the Matter of Alika Aviation, FAA Order No. 1999-14 at 8 (December 22, 1999.) Likewise, when deciding an appeal from an ALJ's initial decision, the Administrator is not concerned with what transpired during an informal conference or settlement discussion.

Houtenbos' argument is based upon his assumption that it would make a difference to the outcome of this decision whether the phone was grabbed out of his hand and whether he jumped out of his seat immediately afterwards. He is wrong in this regard. Assuming *arguendo* that Billing did provoke the assault by Houtenbos, such provocation, as the ALJ noted,¹¹ would not constitute a valid affirmative defense to the violations of Section 91.11. For obvious reasons, aviation safety requires that passengers refrain from assaulting flight attendants and not distract the pilots from their flying duties in the cockpit during a flight regardless of any real or imagined provocation. A flight

¹¹ The ALJ stated in his decision:

So that even, *arguendo*, accepting the testimony – were I to accept the testimony as true, that in a certain sense Ms. Billing provoked his reaction by ripping the phone from his hands, the pushing incident, a physical assault, otherwise known as a battery, was across the line whether this is a civil or criminal prosecution, and that is the first violation.

(Tr. 267-268.)

attendant's primary responsibility during a flight is to protect the safety of passengers. If a flight attendant is hurt by an irate passenger or is fending off an attack, the flight attendant cannot attend to those important safety duties.¹²

2. It was established during the hearing that Billing had filed a civil suit against Houtenbos. Houtenbos argues on appeal that Billing's attorney in the civil suit passed notes to the agency attorney while he cross-examined Houtenbos. Houtenbos suggests that the agency attorney questioned him about personal matters, such as about his wife, his children and his sources of income, as a result of one of those notes. Houtenbos contends on appeal that those questions were irrelevant to this matter and that the agency attorney served as a "surrogate" for Billing's private attorney.

It cannot be determined from the official transcript if or when anyone handed notes to the agency attorney. Likewise, there is nothing in the record to explain why the agency attorney asked questions about Houtenbos' business or his children.¹³ Houtenbos did not object to any of these questions at the hearing. Regardless of the agency

¹² As Administrative Law Judge Kolko so aptly stated in a previous case:

[F]light attendants ... are responsible essentially for the safety of the crew ... and passengers. Their primary responsibility ... is the safety of those persons encased in that metal capsule and for that reason, what they say, has to go, whether one likes it or not, ... even if it appears unreasonable at the time, for the simple reason that law and order in an enclosed capsule at 30,000 feet just has to be maintained.

In the Matter of Ignatov, oral initial decision, Tr. 115-116, *attached to* FAA Order No. 1996-6 (February 13, 1996). Judge Kolko in that decision was referring to the need for passengers to comply with the instructions of flight attendants. His remarks are equally applicable to situations in which a passenger assaults a flight attendant because the passenger considers the flight attendant's actions to be unreasonable.

¹³ The agency attorney asked Houtenbos for the names and ages of his children, and whether they lived with him. The ALJ interrupted this line of questioning, asking whether these questions were necessary, and the agency attorney replied, "No." (Tr. 251.)

attorney's motivation for asking these questions, there is no evidence that Houtenbos was prejudiced in this matter – or any other legal action – by his answers to those questions.

3. Houtenbos argues on appeal, as he did at the hearing, that he was only programming the telephone and did not make any calls during the flight. The ALJ specifically found that Houtenbos was programming the phone and did not use the cell phone to send or receive calls. He found, however, that the fact that Houtenbos was programming the phone was immaterial to the violations alleged. (Tr. 265.) The ALJ was correct in this regard because Complainant did not allege that Houtenbos had violated 14 C.F.R. § 91.21 that prohibits the operation of portable electronic devices.¹⁴

4. Houtenbos argues on appeal that Complainant's witnesses committed perjury at the hearing, and as a result, the ALJ's credibility assessments were incorrect. To support this allegation, Houtenbos points to differences in the testimony and the written statements that were entered into evidence as exhibits. For example, Houtenbos notes that Billing testified that Houtenbos "grabbed my arms on the top, and he started slamming me into the counter" and that he held onto her until the first officer appeared. He contrasts this with the testimony of Friedel that Houtenbos "clearly shoved her and then released her" and that this action was "momentary," and the testimony of Stuart that Houtenbos "threw her on the shoulders against the wall" and that there was only one shove. (Appeal Brief at 3-4.)

The differences in these accounts – whether Houtenbos shoved or grabbed her by the upper arms or the shoulders and whether it was momentary or until the first officer appeared – are so trivial that they do not justify disturbing the ALJ's credibility

¹⁴ As noted previously, the ALJ stated that this case was not about whether Houtenbos had used electronic equipment or a cell phone. (Tr. 261.)

assessments. All the witnesses agreed on the key point that Houtenbos grabbed and pushed Billing.¹⁵ On review, the Administrator will not disturb an ALJ's credibility assessments based only upon minor inconsistencies in the evidence. In the Matter of Werle, FAA Order No. 1997-20 at 11 (May 23, 1997).¹⁶

5. Houtenbos argues on appeal that he did not obstruct Billing from performing her duties because, as she testified, handling problems with passengers is her responsibility as the flight service manager. Houtenbos seems unaware that the ALJ did not hold that he had interfered with the performance of the flight manager's duties. Instead, the ALJ held that Houtenbos twice assaulted Billings, and that he interfered with the performance of the first officer's duties because he was required to leave the flight deck -- and his flying duties -- to deal with Houtenbos' aggressive behavior. (Tr. 269.)

¹⁵ The Administrator has held that the term "assault" as used in Section 91.11 should be interpreted to mean both a battery, meaning an intentional harmful or offensive physical contact, as well as an assault, meaning intentional acts causing apprehension of such a harmful or offensive contact. In the Matter of Ignatov, FAA Order No. 1996-6 at 8-9 (February 13, 1996). The Administrator explained:

Common sense demands that the term "assault" as used in Section 91.11 be read to include both assault and battery. To hold otherwise would result in the illogical and undesirable result that shaking one's fist under a crewmember's nose would constitute an assault under Section 91.11, but actually hitting the crewmember would not.

Id. at 9.

¹⁶ The other inconsequential inconsistencies that Houtenbos mentions in his brief are:

- whether Billing fell to the floor after she was shoved;
- whether Houtenbos actually informed the flight attendants that he had been only programming the phone;
- whether a passenger reported that Houtenbos was drunk;
- whether Houtenbos was yelling or cursing (rather than merely engaging in a "heated discussion" with Billing);
- and whether Houtenbos sat in his seat for a few minutes before following Billing into the galley to retrieve his phone.

6. Houtenbos contends that he did not know that he could have subpoenaed witnesses. He has failed, however, to explain whom he would have subpoenaed, had he known he could do so, what that person would have testified to, and how that would have affected the outcome of this case. Houtenbos was traveling with a friend during this flight, but he testified that his friend had not been able to see what transpired when Houtenbos and Billing were in the galley. (Tr. 233.)

In light of the foregoing, Houtenbos' appeal is denied, and the ALJ's oral initial decision is affirmed. A \$3,300 civil penalty is assessed.¹⁷



MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 18th day of November 2002

¹⁷ Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).